No. 92-1521

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In The

# Supreme Court of the United States

October Term, 1992

M/V PINE FOREST, *et al.*,

*Cross-Petitioners,*

*vs.*

NELSON R. RABY, *et al.*,

*Cross-Respondents.*

*Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a district court have "inherent authority" to award attorneys' fees to plaintiffs in an action under 46 U.S.C. §10313, the Seaman's Wage Act, even though the Act does not grant a right to such fees and does provide penalties for bad faith failure to pay wages due?

2. Should *Vaughan v. Atkinson* be extended to give a district court authority to award attorneys' fees for an alleged "bad faith" failure to pay wages due a seaman under a contract which does not provide for such fees?

3. Does a district court have inherent power to punish substantive prelitigation conduct by awarding attorneys' fees?

4. If attorneys' fees were properly awardable in this case, should the court of appeals nevertheless have reversed and remanded to recalculate the fee award, since plaintiffs' final recovery was only a small fraction of the amount claimed, plaintiffs only prevailed on one of the several claims which they pursued in the case, and the fees awarded were substantially higher than the amount recovered?

## LIST OF ALL PARTIES TO THE PROCEEDING

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## CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners M/V Pine Forest, Delica Shipping, S.A., and Inui Steamship Co., Ltd. respectfully pray that a writ of certiorari issue to review the award of attorneys' fees upheld in the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 14, 1992.

## OPINIONS BELOW

The references to the opinions below are set forth in the plaintiffs' petition for writ of certiorari.

## STATEMENT OF JURISDICTION

This cross-petition for writ of certiorari is filed under Rule 13.1 and is designated as a cross-petition only to avoid confusion, since a petition for writ of certiorari has already been filed by the plaintiffs in this action. This Court has jurisdiction to grant this cross-petition even if it does not grant review of plaintiffs' petition. The judgment sought to be reviewed was entered by the United States Court of Appeals for the Ninth Circuit on October 14, 1992. Rehearing was denied on December 9, 1992. Plaintiffs' petition was filed on February 8, 1993. Jurisdiction to review the judgment in question is conferred by 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The Seaman's Wage Act provides in part:

* * *

> (e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take

action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by the subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. § 10313 in its entirety is pertinent to this cross-petition and it is set forth in the Appendix to plaintiffs' petition for writ of certiorari (hereafter Pet. App.) at A54.

## STATEMENT OF THE CASE

### A. Proceedings Below

This was an action brought in the names of twenty-one Filipino crew members of the M/V PINE FOREST, a foreign-flagged, foreign-operated and foreign-owned vessel. Jurisdiction was obtained over the vessel when it stopped in Tacoma, Washington, to pick up a cargo of logs for transport to Japan. The claimed basis for the district court's jurisdiction is set forth in the petition for certiorari.

Of the plaintiffs named in the complaint, thirteen signed it and were discharged in the United States. These have been referred to throughout this case as the "individual" or "Dodson" plaintiffs. The other seamen were either discharged in Japan before the complaint was filed or declined to sign it and sailed with the PINE FOREST after its owners posted a $19 million release bond required by the district court. The action on their behalf was brought without their consent by a Filipino union known as AMOSUP.

The initial complaint was filed on January 30, 1990, and sought back wages for eleven individual plaintiffs under 46 U.S.C. § 10313, in addition to statutory penalties and damages for fraud and intentional infliction of emotional distress. Defendants, the vessel, the shipowner, and the ship operator, tendered the back wages claimed on February 8, 1990, the day the individual plaintiffs left the vessel. But the tender was declined because an amended complaint adding additional plaintiffs was about to be filed. That complaint was attached to a motion to amend filed on February 13, 1990. On that date, defendants paid the thirteen individual plaintiffs $267,585, the amount they had demanded under § 10313. Defendants counterclaimed for return of this money and for the damages incurred in posting and maintaining an excessive release bond.

The case went to trial in May, 1990, on the fraud and intentional infliction of mental distress claims, on a blacklisting claim added after the PINE FOREST had been arrested, and on the back wages claimed by the AMOSUP plaintiffs. The trial court awarded the plaintiffs a total of $32,657,536 and accruing statutory penalties at roughly $900,000 per month. It also awarded attorneys' fees, "attorneys' disbursements" and costs. Of this amount, the individual plaintiffs were awarded $25,315,837 in additional back wages, statutory penalties, compensatory damages, and punitive damages, plus their proportionate share of the accruing penalties and costs. In addition, the court awarded them $410,043 in attorneys' fees and awarded $86,471 in "attorney disbursements" to Mr. Dodson, personally. The trial court ruled that, "Award of attorneys' fees is predicated on defendants' bad faith and is proper under *Vaughan v. Atkinson*, 369 U.S. 527 (1962)."

On appeal, the Ninth Circuit reversed the judgment for all plaintiffs in its entirety, with the exception that it upheld the attorneys' fees and perhaps the attorneys' disbursement awards to the individual, but not the AMOSUP plaintiffs. The decision was reported under the name of one of two other cases with which it had been coordinated. *Su v. Southern Aster*, 978 F.2d 462 (9th Cir. 1992). The Ninth Circuit ruled that although the individual plaintiffs had lost on every theory and claim propounded at trial, they were the prevailing parties because they had recovered the $267,585 as a result of their suit and they were entitled to that amount under § 10313. It stated in addition that:

> Ordinarily the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff "to go to court to get what was plainly owed him." [citing *Vaughan v. Atkinson*].

*Id.* at 475.

**B. The International Economic Context of This Dispute[1]**

A large part of the world's commercial shipping — and of shipping that serves the United States — is carried on by so-called flag of convenience ("FOC") vessels manned by Asian crews. Of the third world countries that supply FOC crews perhaps the Republic of the Philippines is the most dependent economically on the jobs these vessels provide. The Philippines closely regulates Filipino employment on FOC vessels through the POEA, the Philippine Overseas Employment Administration. Under POEA regulations, all FOC crews must be obtained through licensed Filipino manning agents, all employment contracts for each job must be submitted for POEA approval and all disputes arising between vessel and seaman must be submitted to arbitration in the Philippines. ER 236, 237, 276, 281, 285-287, 294, 297, 299-300, 304.

The International Transport Workers Federation ("ITF") is an international labor secretariat headquartered in London. Although it has affiliates in other parts of the world, including Asia, it primarily represents Western European seamen. Many of those seamen's jobs were lost when FOC ships, claiming that western wages were far too high for them to survive, looked to the third world for their crews. *See,* Chapman, *Trouble on Board,* 84 (ILR Press, Ithaca, 1992). In candid testimony in this case, the head of the ITF's Special Seafarers Section admitted that he is in charge of a campaign to destroy flag of convenience shipping. ER 427-430. As part of this campaign, the ITF attempts to force FOC vessels to pay a worldwide standard wage comparable to the average wage

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1. The following statement enlarges upon the Statement of Facts in the opinion of the Court of Appeals, which in most essential respects correctly reflects the record at trial. Some additional facts are supported by references to the Excerpts of Record ("ER") or to the Trial Transcript ("Tr"). The facts have been simplified for purposes of the issue raised by this cross-petition.

paid to the seamen of industrialized nations. The mechanism of enforcement is the secondary boycott — the use of affiliated longshoremen and pilots unions to disrupt the *operations of these* vessels at ports in which these unions are powerful. ER 431-432; *see generally,* Northrup and Rowan, *The International Transport Workers Federation and Flag of Convenience Shipping,* 31-111 (Univ. Penn., Phil. 1983).

This worldwide wage is far higher than the wage demanded by Filipino and other Asian seamen, and if it were accepted by FOC vessels, the incentive for using third world seamen would largely disappear. Thus, the ITF campaign threatened the seamen and economies of the Asian countries who supplied most of the crews to FOC vessels, as well as the owners of those vessels. Chapman, *supra,* p. 87 ("The mandate from the most influential affiliates [of the ITF] was to protect Western jobs.").

In the 1970s, manning agents in the Philippines and other Asian countries responded to the ITF threat. They acted to create the impression that the crews they supplied were receiving ITF wages when they were in fact receiving the manning agents' government-approved company wage. The manning agents recruited seamen who were willing to accept their regular wages — plus a bonus — while signing receipts and shipping articles reflecting payment of the ITF wage. These seamen also promised to tell ITF "inspectors" that they were receiving the ITF wage. Many FOC ship operators cooperated with this strategy.

By the end of the 1980s, the ITF Program — or double bookkeeping as it was sometimes called — was a widespread, accepted practice throughout Asia, as even plaintiffs' counsel conceded below. Tr. 370. Since 1989, there have been several lawsuits around the country — at least four in the Ninth Circuit and two in the Fifth Circuit brought by Mr. Dodson — on behalf of Asian seafarers who had originally agreed to participate in the practice.

## C. The Events Out of Which This Action Arose

In March, 1989, a Filipino manning agent supplied a crew of nineteen seafarers to the PINE FOREST. All but one of its members had sailed on vessels following the ITF double bookkeeping program in the past. Many had sailed on several such ships. At the time they were recruited, they agreed that they would be paid their regular company wage, but would tell ITF inspectors, if they were encountered, that they were receiving the ITF wage. Tr. 227, 228, 240, 241; ER 459-461, 481, 497-498, 510, 568-569, 592-593, 597-598, 627, 630, 633, 645, 647, 669. Prior to joining the ship in Japan, the crew signed POEA standard form individual employment contracts providing for a one year term aboard the PINE FOREST and payment at the company wage. Those seamen who testified on the subject admitted that their jobs were highly desirable and that their regular wage was very attractive by Philippine standards. Tr. 192, 223, 241; ER 482, 497, 545, 551, 611, 626; *see*, Chapman, *supra*, p. 117.

The crew sailed aboard the PINE FOREST from the end of March 1989, when it signed the shipping articles, until late January 1990, signing receipts each month both for their actual wage and the ITF wage. Then, one of its members, Nelson Raby, encountered Louisiana attorney Richard J. Dodson, who told him that he had a legal right to the wages written into the shipping articles. ER 546-547. Raby then brought Mr. Dodson and an associate on board the vessel with a complaint and eleven of the nineteen Filipino crewmembers signed it. The seamen admitted that they had never raised any objection to the wage they had been receiving until that time.

The plaintiffs relied throughout the proceedings on the shipping articles as the source of their rights. But in bringing their action they disregarded the articles' provisions requiring them to first take any grievance they might have to the Master for informal

resolution. Tr. Exh. 1. They also did not comply with Philippine regulations that they follow a set grievance procedure under the exclusive jurisdiction of the Philippine government.

## REASONS FOR GRANTING THE WRIT

The district court awarded $410,043 in attorneys' fees and $86,471 in attorneys' disbursements based upon this Court's opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). The Ninth Circuit affirmed the fee award on the same grounds. *Vaughan v. Atkinson* is often cited as an "equitable exception" to the American Rule against fee shifting or for the broader proposition that the federal courts have inherent equitable authority to award attorneys' fees for "bad faith." *See, e.g, F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 n. 17 (1974). But this Court has made it clear that the district courts have no equitable power to award attorneys' fees in the context of a statutory cause of action when Congress has failed to include attorneys' fees as a statutory remedy. *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967). The Seaman's Wage Act does not provide for attorneys' fees. The Ninth Circuit's affirmance of fees for plaintiffs' recovery under the Seaman's Wage Act is directly contrary to *Fleischmann v. Maier* and cases that follow it. This conflict demands correction.

Another reason for review is to answer the troubling question whether the district court may award attorneys' fees for what can only be characterized as bad faith breach of contract. This Court appeared to leave this unanswered in *Chambers v. Nasco*, ___U.S. ___ 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Defendants submit that the district court lacks inherent power to sanction bad faith prelitigation conduct by awarding substantial attorneys' fees. This is an unrelated and important question of federal law that should be settled by this Court.

Finally, the Ninth Circuit's affirmance of the entire attorneys' fees award after it reversed all of the $32.6 million judgment

offends this Court's decision in *Hensley v. Ekerhart*, 461 U.S. 424 (1983). Plaintiffs were immediately paid $267,586, the amount of wages the plaintiffs claimed were due them. Attorney time and expense were then focused on the assorted tort claims and the claim for penalties. Every theory advanced to support the $32.6 million judgment was rejected by the Ninth Circuit, yet all of the attorneys' fees originally awarded to these plaintiffs were affirmed on appeal. Even if this Court would affirm an award of attorneys' fees in this case, defendants submit that the amount of the fees is not reasonable. This is yet another independent reason for granting review.

The issues raised by defendants' Cross-Petition are not limited to this case. The Second Circuit has also held that *Vaughan v. Atkinson* provides a right to attorneys' fees in a Seaman's Wage Act claim. *Lewis v. Texaco*, 527 F.2d 921 (2d Cir. 1975), *on remand*, 418 F. Supp. 27 (S.D.N.Y. 1976). The District Court for the District of Oregon awarded $637,410 in attorneys' fees and disbursements in the related case, *Jose v. M/V Fir Grove*.[2] The substantial fee awards in these cases dwarf the results obtained and no doubt encourage like suits. Defendants submit that it is a policy decision for Congress whether to encourage Seaman's Wage Act litigation by awarding attorneys' fees in addition to the penalty provisions now part of the Act.

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2. The judgment in the *Fir Grove* case allows plaintiffs to retain $349,739, the total amount tendered to them shortly after the complaint and amended complaint were filed, and $16,233 in additional wages and interest. Plaintiffs have appealed from the judgment on the merits. Ninth Circuit No. 92-35610. Defendants have cross appealed from the attorney fee award. Ninth Circuit No. 92-36537; 92-36667; 92-36846. The Ninth Circuit will likely follow its decision affirming the fee award in this case unless there is an intervening and controlling decision from this Court. *See, e.g., United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985) (three judge panel may re-examine Ninth Circuit precedent when an intervening Supreme Court decision undermines that precedent).

**A. The Grant of Attorneys' Fees Under *Vaughan v. Atkinson* Is Contrary to Supreme Court Precedent.**

*Vaughan v. Atkinson* was an action for maintenance and cure. The employer's duty to provide an injured or ill seaman with maintenance and cure is an ancient remedy recognized and enforced by federal common law. The duty arises by virtue of the employment relationship and cannot be abrogated by contract. *Cortes v. Baltimore Insular Line,* 287 U.S. 367 (1932). Negligent or unreasonable failure to pay maintenance and cure is an independent tort that entitles the seaman to compensatory damages for aggravation of the injury. *Id.*

The award of attorneys' fees in *Vaughan* was cast as compensatory damages, but the standard resembled that appropriate for exemplary damages, an inconsistency pointed out by Justice Stewart in his dissenting opinion. 369 U.S. 527 at 539-40. What is clear is that attorneys' fees in *Vaughan* were awarded as an additional remedy in tort for breach of a common law duty. In the context of a statutory claim, however, this Court has expressly declined to award fees under *Vaughan. Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967).

*Fleischmann* was a trademark infringement case brought under the Lanham Act, 15 U.S.C. § § 1051-1127. The question was whether the court could award attorneys' fees for deliberate infringement in light of the fact that the Act's specified remedies did not include attorneys' fees. The Supreme Court described the limited exceptions to the American Rule prohibiting fees in the absence of statute or contract, including the exception created in *Vaughan v. Atkinson*: "In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees as an item of compensatory damages (not as a separate cost to be taxed)." *Id.* at 718, *citing, Vaughan v. Atkinson*, 369 U.S. 527 (1962). The Court then noted that the "recognized exceptions to the general rule were

not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies." *Id.* at 719. The Court concluded that because Congress had not included attorneys' fees in the Lanham Act, it would be inappropriate to judicially create a compensatory remedy in addition to the remedies available under the statute. *See also, Smith v. Robinson*, 468 U.S. 992 (1984) (petitioner not entitled to attorneys' fees when claim was one to enforce the provisions of the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, a comprehensive remedial statute that does not provide for attorneys' fees); *Summit Valley Industries v. Carpenters*, 456 U.S. 717 (1982) (attorneys' fees not available to prevailing party under § 303(b) of the Labor Management Relations Act); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) (error to award fees under the Miller Act, 40 U.S.C. § 270, *et seq.*, when the Act does not include them).

Plaintiffs may argue that *Fleischmann* does not apply because courts have greater equity powers in admiralty, as well as particular solicitude for seamen. But this Court has recently made clear that once remedies have been established by Congress, even the court in admiralty is no longer free to act. *See, Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990). In *Miles*, the Court declined to allow non-pecuniary damages in a general maritime wrongful death claim or loss of future income in a survival action because the Jones Act did not include such damages. The Court noted the traditional solicitude for seamen, but then held:

> We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions

> that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

Here, plaintiffs' claim was for wages and penalties under the Seaman's Wage Act. Although of hoary origin, the Act was recodified and updated by Congress in 1983. The penalty provision, 46 U.S.C. § 10313(g), provides for payment of two days wages for each day that wages are withheld without sufficient cause. This is the same double wage penalty found in the statute prior to reenactment and explained in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). This Court concluded in *Griffin* that the purpose of the statute is to secure prompt payment of seamen's wages and that "Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment." *Id.* The statute does not have any provision for attorneys' fees, and it never has.

If Congress had intended that attorneys' fees should be recoverable in wage dispute cases, it could have included a fee provision in the wage statute, just as it has in myriad civil rights statutes. Congress instead reenacted the penalty provision to insure that seamen were promptly paid. The effectiveness of the wage penalty is demonstrated by the fact that the defendants paid plaintiffs' various wage claims totaling $267,586 promptly upon demand and within days of the institution of suit.

The district court apparently felt that it could award fees under the general maritime law despite the absence of an express attorneys' fees provision in the Seaman's Wage Act. The court was wrong. Section 10313 is a comprehensive regulation of the remedies available under a seaman's contract for wages. Congress chose the double wage penalty as the remedy for unreasonable refusals to pay wages due under the Act. *Griffin, supra.* "[W]hen legislation expressly provides a particular remedy or remedies,

courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passengers Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974). The court was not free to supplement statutory remedies afforded by the Wage Act under general maritime law. *Fleischmann, supra, Miles, supra.*

**B. Did the District Court Have Inherent Authority to Punish What It May Have Considered to Be Bad Faith Breach of Contract?**

The district court's findings and conclusions state: "Plaintiffs as the prevailing party herein shall be awarded reasonable attorneys' fees in an amount to be determined at a later date. Award of attorneys' fees is predicated on defendants' bad faith and is proper under *Vaughan v. Atkinson.*" Pet. App. at 50. The Ninth Circuit did not discuss the finding of bad faith as such, but it did affirm the finding that the defendants were liable for the amount of wages stated in the ship's articles and not the much lower rate of the individual employment contracts:

> In short, once the shipowners executed the shipping articles in furtherance of the double-bookkeeping scheme, they were bound to pay the rate recorded in the articles rather than the lower rate promised before the voyage.

*Su v. Southern Aster*, 978 F.2d 462, at 468. Pet. App. at A10. The Ninth Circuit essentially affirmed an award of attorneys' fees for breach of contract.

The sweeping language of *Vaughan v. Atkinson* implies that fees may be awarded any time a party is "forced to hire a lawyer and go to court to get what was plainly owed him." But such a reading of the "bad faith exception" to the American Rule would

swallow a large part of the rule. Defendants submit that *Vaughan* does no more than create an additional tort remedy for breach of a common law duty to pay maintenance and cure. The Ninth Circuit's reliance upon *Vaughan* in this case creates a tort remedy for willful or bad faith breach of contract in the context of a statutory claim. But do the courts really have inherent power to punish a willful breach of contract by fee shifting?

This Court recently grappled with the limits of inherent power to shift fees for bad faith. In *Chambers v. Nasco*, the Court affirmed an award of attorneys' fees based upon bad faith acts committed during the course of litigation. The majority noted that it expressed no opinion as to whether the district court would have had the inherent power to sanction the defendant for the underlying breach of contract. *Id.*, __ U.S. __ 115 L. Ed. 2d at 51, n. 16.

Justice Kennedy for the dissenters argued that the majority had mischaracterized the conduct for which the defendant was sanctioned and urged that the courts do not have the inherent authority to punish bad faith breach of contract:

> Despite the Court's equivocation on the subject, it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation conduct. A Court's inherent authority extends only to remedy abuses of the judicial process. By contrast, awarding damages for violation of a legal norm, here the binding obligation of a legal contract, is a matter of substantive law.
>
> The American Rule recognizes these principles. It bars a federal court from shifting fees as a matter of substantive policy, but its bad faith exception permits fee shifting as a

> sanction to the extent necessary to protect the judicial process. The Rule protects each person's right to go to federal court to define and vindicate substantive rights. . . . When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.

___U.S. ___, 115 L. Ed. 2d at 64 (citations omitted).

The question whether the courts have inherent power to punish bad faith breach of contract may not have been squarely presented in *Chambers v. Nasco*, but it is here. Defendants submit that the district court lacked the authority to impose fees for what it considered to be prelitigation bad faith. The Ninth Circuit compounded the error when it affirmed. This Court should grant certiorari and decide the issue.

**C. The Ninth Circuit Was Obligated to Recalculate or Remand for Recalculation the Attorneys' Fees Awarded After It Reversed the Judgment for $32.6 Million.**

If this Court agrees that attorneys' fees are recoverable in a wage claim under the Seaman's Wage Act, it should consider whether the fee awarded is reasonable, given plaintiffs' limited success following appeal. *Hensley v. Ekerhart*, 461 U.S. 424 (1983). Defendants immediately tendered the amount of the wage claim. This was to avoid the two day wage penalty which this Court has held continues to accrue if any amount of the wages due is withheld without sufficient cause. *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982). In *Griffin*, the shipowner's delay in payment of $412 until judgment resulted in penalties of over $300,000. The

*Griffin* decision gives any shipowner a strong incentive to pay the demand and reserve the right to litigate whether the amount claimed was actually due. At trial, defendants contended that the individual employment contracts signed by the plaintiffs in Manila set the wage rate, while plaintiffs argued that the ITF wage rates stated in the articles controlled. The district court found the articles to be the contract of employment and the Ninth Circuit affirmed. The Ninth Circuit thus held the payment of $267,586 made in February 1990 to have been required under the Act. This was the sole issue upon which plaintiffs prevailed. The Ninth Circuit reversed the judgment for tort damages for "blacklisting," intentional infliction of emotional distress or "outrage" and fraud. The Ninth Circuit also reversed the $17 million in punitive damages and the $6.8 million in statutory penalties.

Despite the reversal of the $32.6 million judgment, over $25 million of which were for these plaintiffs, the Ninth Circuit affirmed the award of counsel fees, expenses and disbursements in total. Thus, the defendants are required to pay plaintiffs' attorney $410,043 in fees, and $86,471 in attorneys' disbursements for a "victory" that was won just days after the institution of suit. Plaintiffs may argue that the defendants' counterclaim required them to litigate their right to retain the funds tendered. But the wages were paid and disbursed over three years ago to thirteen individuals residing in the Philippines and were never "recoverable" as such, even if defendants prevailed on their counterclaim. Irrespective of this practical reality, the Ninth Circuit's affirmance of the fees and expenses does not take into account the time and money expended on losing issues. The extent of plaintiffs' success is a "crucial factor" in determining a reasonable fee. *Hensley, supra*. The Ninth Circuit was required to consider the limited success following appeal before it affirmed the fee award or to remand the matter to the district court to reset the fee.

The Ninth Circuit's affirmance of the fee award directly contradicts *Hensley v. Ekerhart* and unjustifiably rewards the plaintiffs' counsel for expending judicial resources on claims that were deemed without merit on appeal.

## CONCLUSION

The "bad faith" exception to the American Rule against fee shifting created by *Vaughan v. Atkinson* is often repeated but rarely explained. Certainly it cannot mean that litigants are entitled to an award of attorneys' fees simply because they were "forced to hire a lawyer and go to court" to obtain relief for breach of contract. No matter how broadly *Vaughan* may be applied in common law actions, it has no place in a statutory claim. Congress has set the remedy for failure to pay wages without sufficient cause. The district court had no inherent authority to supplement the statutory remedy by awarding attorneys' fees. The Ninth Circuit decision is contrary to Supreme Court precedent respecting these important issues of federal law. Defendants respectfully request that this Court grant their Cross-Petition for Certiorari and decide the issues raised.

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Respectfully submitted,

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